



Signed and Filed: July 16, 2009

A handwritten signature in dark ink, appearing to read "T. E. Carlson", is written over a horizontal line.

THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re)	Case No: 08-32217 TEC
)	
BETTE JO CARR-WALTON and)	Chapter 7
JAMES WALTON, JR.,)	
)	
)	
Debtors.)	
)	
WILTON MARSHALL, JR. and)	Adv. Proc. No. 09-3068 TC
WILLIE MAE MARSHALL,)	
)	
Plaintiffs,)	
)	
vs.)	Date: July 17, 2009
)	Time: 9:30 a.m.
BETTE CARR-WALTON, JAMES WALTON,)	Ctrm: Hon. Thomas E. Carlson
JR., WALTON & WALTON REAL ESTATE)	235 Pine St., 23rd Fl.
COMPANY,)	San Francisco, CA
)	
)	
Defendants.)	
)	

TENTATIVE RULING REGARDING DEFENDANTS' MOTION TO DISMISS

For the following reasons, the court is inclined to grant the motion to dismiss the section 523(a)(4) claim, to deny the motion to dismiss the section 523(a)(2)(A) claim, and to strike Plaintiffs' jury trial demand.

The clerk's default entered in the state-court action styled as *Marshall v. Walton*, San Francisco Sup. Court Case No. CGC-07-

1 469938 (the State-Court Action) has no collateral estoppel effect
2 in this bankruptcy proceeding because, *inter alia*, it appears no
3 judgment was entered in the State-Court Action. E.g., In re
4 Harmon, 250 F.3d 1240 (9th Cir. 2001).

5 523(a)(4) claim. Defalcation by a fiduciary duty requires
6 something more than a breach of a general fiduciary obligation
7 imposed by state law. In re Evans, 161 B.R. 474, 478 (9th Cir. BAP
8 1993). The debt alleged to be non-dischargeable must arise from a
9 breach of trust obligation imposed by law. Id. at 477. In
10 addition, the requisite trust relationship must exist prior to and
11 without reference to the act of wrongdoing. Id. Here, Plaintiffs
12 fail to state a claim under 523(a)(4), because there is no
13 allegation that a trust relationship existed prior to, and without
14 reference to, the act of wrongdoing. Nor is there any allegation
15 that Debtors, as real estate brokers, received property from
16 Plaintiffs for a specific purpose. Absent such allegations,
17 Plaintiffs have failed to state a claim under 523(a)(4) upon which
18 relief may be granted. Evans, 161 B.R. at 477-78.

19 523(a)(2)(A) claim. It appears that Plaintiffs have stated an
20 actionable claim under section 523(a)(2)(A) because the elements of
21 a fraud claim are either expressly alleged, or may be reasonably
22 inferred from the complaint. In re Lane, 937 F.2d 694, 698 (1st
23 Cir. 1991). The elements of a claim for fraudulent
24 misrepresentation under section 523(a)(2)(A) are: (1) a
25 representation of fact by the debtor, (2) that the debtor knew at
26 the time to be false, (3) that the debtor made with the intention
27 of deceiving the creditor, (4) upon which the creditor justifiably
28 relied, and (5) that damage proximately resulted from the

1 misrepresentation. Field v. Mans, 516 U.S. 59, 73-75 (1995); Apte
2 v. Japra (In re Apte), 96 F.3d 1319 (9th Cir. 1996).

3 The complaint alleges that Debtors made a false representation
4 to Plaintiffs' that, unless they took action, their daughter would
5 lose her real property. The complaint alleges that this statement
6 was false, and that Debtors' motive in making this statement was to
7 earn commissions. The complaint alleges that Plaintiffs are
8 elderly and retired, and did not understand they were involved in a
9 purchase and sale transaction. The complaint alleges that, at the
10 time of the transaction, the property had a mortgage of \$300,000
11 and that Debtors caused Plaintiffs to purchase the property at an
12 inflated price of \$550,000, using two loans with pre-payment
13 penalties and interest rates of 8 percent and 10 percent. The
14 complaint alleges, *inter alia*, that Debtors are unable to sell or
15 refinance the property, and must continue making mortgage payments
16 they cannot afford. The complaint alleges Plaintiffs were damaged
17 by Debtors actions. From the facts alleged in the complaint that
18 Plaintiffs are elderly and did not understand the transaction, an
19 inference can be drawn that Plaintiffs reliance on Debtors' false
20 statements was justifiable. Accordingly, it appears that
21 Plaintiffs have alleged facts sufficient under section
22 523(a)(2)(A). Lane, 937 F.2d at 698.

23 The court notes that the facts alleged may also support a
24 claim under section 523(a)(6).

25 Plaintiffs have demanded a jury trial. There is no
26 constitutional right to a jury trial in a nondischargeability
27 proceeding. In re Locke, 205 B.R. 592, 600 (9th Cir. BAP 1996).

28 ***END OF TENTATIVE RULING****

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Court Service List

Martin Glickfeld, Esq.
Law Offices of Martin Glickfeld
2133 Lombard at Fillmore
San Francisco, CA 94123

Baron J. Drexel, Esq.
Law Offices of Baron J. Drexel
212 9th Street, Suite 401
Oakland, CA 94607